

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY GRANT JONES,

Defendant-Appellant.

UNPUBLISHED

August 11, 2009

No. 285286

Macomb Circuit Court

LC No. 07-003348-FC

Before: Owens, P.J., and Servitto, and Gleicher, JJ.

PER CURIAM.

Defendant was found guilty by a jury of attempted first-degree criminal sexual conduct (CSC-1), MCL 750.92 & MCL 750.520b(1)(e) (use of weapon), and kidnapping, MCL 750.349. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 5 to 10 years for the attempted CSC-1 and 20 to 50 years for the kidnapping, with credit for 306 days already served. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from an incident in which he forcibly attempted to sexually penetrate the complainant, a former girlfriend, while wielding an Exacto knife and preventing her from obtaining help or checking on the well being of her three-year-old daughter who was present in the apartment. During the incident, defendant struck the complainant numerous times, threatened to kill her, threatened harm to numerous others, and caused her to fear for the safety of her young daughter.

Defendant raises two issues on appeal: First, that there was insufficient evidence to find him guilty of kidnapping and, second, that the sentencing court erred in scoring ten points for Offense Variable (OV) 10.

Criminal defendants do not have to take any special steps to preserve an appellate claim of insufficient evidence. *People v Cain*, 238 Mich App 95, 117; 605 NW2d 28 (1999). To determine whether sufficient evidence was presented to sustain a conviction, the evidence is reviewed in the light most favorable to the prosecution. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007).

We review the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential

elements of the crime were proven beyond a reasonable doubt. Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime. The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. [*Id.* (internal citations omitted).]

The kidnapping statute states that “[a] person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to . . . [e]ngage in criminal sexual penetration or criminal sexual contact with that person.” MCL 750.349(1)(c). The statute also defines “restrain” as meaning

to restrict a person’s movements or to confine the person so as to interfere with that person’s liberty without that person’s consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. [MCL 750.349(2).]

The complainant testified that she heard her daughter crying while defendant was trying to rape her. She tried to push him and wanted to go to her daughter, but defendant told her no and had the Exacto knife the entire time he was in her bedroom. The complainant testified that she felt helpless and was scared to leave her bedroom. She cried herself to sleep and did not leave her room until the morning.

When viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant restricted the complainant’s movements or interfered with her liberty without authority and with the intent to engage in criminal sexual penetration or contact.

Defendant preserved his challenge to the assessment of ten points for OV 10 by objecting at the sentencing hearing. “The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo.” *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Points are assigned under OV 10 when there is “exploitation of a vulnerable victim.” MCL 777.40. Ten points are assigned when “[t]he offender exploited a victim’s physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.” MCL 777.40(1)(b). As used in this statute, exploit “means to manipulate a victim for selfish or unethical purposes” and vulnerability “means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.” MCL 777.40(3)(b) and (c). The focus of OV 10 is on the victim’s vulnerability. *Cannon, supra* at 157-158. The mere existence of a factor listed in the statute does not equate to the victim being vulnerable. MCL 777.40(2).

There was a great deal of testimony at trial concerning the relationship between the complainant and defendant, which was a dating and a live-in relationship at one time. Defendant also provided witnesses who thought he was still dating and living with the complainant on the date of the incident. The complainant testified that, although the dating relationship with defendant had ended in January, she and defendant still saw each other regularly, she had a cell

phone in his name, they assisted each other with moving and applying for a job, and he had spent the night on at least three or four occasions in April and May. The finding of a domestic relationship was supported in this case.

In reviewing the trial court's decision to score ten points to OV 10, we must also review the trial court's assessment of the complainant's vulnerability. Testimony showed that defendant pushed his way into the complainant's apartment in the middle of the night, after she had consumed wine coolers at a barbecue and after she had fallen asleep for the night. Defendant was also aware that the complainant's three-year-old daughter was in the apartment. The complainant testified that defendant threatened to slit her throat, place her body in the trunk of a car, and to take her children. Defendant said he would put the children in the same car and that the children would not even know their mother was in the trunk.

Waking the complainant up in the middle of the night, making comments about killing her and taking her children, all while the youngest child was in the apartment, made the complainant a vulnerable victim and susceptible to injury, restraint, and persuasion. Defendant was clearly able to manipulate the complainant for his own selfish purposes when he attempted to rape her. Accordingly, we find that ten points were properly assessed for OV 10.

Affirmed.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher